

Mark I. Harrison, Bar No. 1226
Geoffrey M.T. Sturr, Bar No. 014063
Osborn Maledon, PA
2929 N Central Ave, Suite 2100
Phoenix, AZ 85012
Telephone: 602-640-9000
mharrison@omlaw.com
gsturr@omlaw.com

RE: Comment to Pending Supreme Court Rule Proposal 14-0009, Petition to Amend Rule 60
or Rules 64-65, Rules of the Supreme Court -- May 14, 2014

COMMENT:

We have now had a chance to review the Petition filed by Presiding Disciplinary Judge O'Neill relating to disbarment in which he proposes two alternative rule changes. The first would make all disbarments "permanent"; the second would add "permanent disbarment" to the currently available sanctions. We are opposed to Alternative 1 which would provide only for "permanent disbarment." We are also opposed to Alternative 2 *in its present form*, which provides for both disbarment and permanent disbarment. However, if certain significant changes—set forth below—are made to the draft proposal, Alternative 2, which provides for both "disbarment" and "permanent disbarment" arguably merits further consideration.

Our basic concern about Alternative 2 as currently drafted is as follows: If permanent disbarment is appropriate only "for the most egregious circumstances," what "circumstances" qualify as "egregious." Because of the severity of the sanction, it would seem essential as a matter of basic fairness and due process to specify in some detail what "circumstances" qualify as "egregious." Otherwise, a lawyer's permanent disbarment would turn on *the wholly subjective judgment of the particular panel and PDJ evaluating the circumstances and imposing the sanction*. Without some objective factors which explicate what is meant by "egregious circumstances" to inform and guide all PDJs and panels considering permanent disbarment, one panel might find that certain conduct warrants permanent disbarment while another panel hearing the same facts finds that only disbarment (or even a long-term suspension) is warranted. It is self-evident that if permanent disbarment is to be added to the available sanctions, it will be necessary to specify in some detail what kind of "circumstances" warrant the sanction. By way of example, one might look at the criteria governing admission. While not perfect, Rule 36(b)(4), Rules of the Supreme Court, lists the factors that should be considered by the Character and Fitness Committee in evaluating the fitness of an applicant for admission. These factors at least provide some objective criteria which the Committee is to consider in making these important decisions. Similarly, it would seem essential to provide as part of any rule governing "permanent disbarment" comparable criteria which explicate what is intended by the use of the phrase "egregious circumstances."

The major premise underlying reinstatement is the belief that even those guilty of serious misconduct can demonstrate rehabilitation. It would seem to logically follow that if permanent disbarment is added to the list of potential sanctions, it must be based on the view that some

offenders cannot be rehabilitated or have so abused the trust we are given as lawyers that they do not deserve the opportunity to even try to establish rehabilitation. *Cf. In the Matter of Johnson*, 231 Ariz. 556, 298 P.2d 904 (2013); *In Re Arrotta*, 208 Ariz. 509, 96 P.3d 213 (2004). Finally, it would also seem to follow that before we decide, by rule, that that some offenders should be precluded from trying to demonstrate rehabilitation, we must decide with some specificity what kind of conduct warrants the professional equivalent of the "death penalty."

With this major reservation, the concept of permanent disbarment is worthy of consideration and discussion and appreciate the willingness of the PDJ to raise the subject. The addition of "permanent disbarment" may arguably be worth considering for the following reasons:

1. First, adoption of the proposal would probably eliminate the anomaly of five year suspensions.
2. Second, and more important, although the practice of law is a right, not a privilege, it is "subject to regulation to ensure that those who engage in the practice of law have the necessary mental, physical and moral qualities required." E.g., *In the Matter of McCartney*, 163 Ariz. 116, 119, 786 P.2d 967, 970 (1990)[quoting *In re Ronwin*, 139 Ariz. 576, 680 P.2d 107 (1983)]. We suspect we all are aware of lawyers who have so callously abused the privilege and the trust conferred on us by the license to practice that they have forfeited the right to seek reinstatement.

Finally, the proposal to add permanent disbarment prompted a good bit of dialogue among our colleagues with significant experience in the representation of lawyers. That dialogue included a number of valuable suggestions that, at a minimum, should inform any serious consideration of the PDJ's proposal. For example, one of our colleagues suggested that research and analysis should be undertaken in connection with the proposal—Are there articles or studies pertinent to the concept of permanent disbarment and more specifically, justifying the addition of "permanent" to the disbarment sanction?¹ It would also seem pertinent to any consideration of the proposal to review the statistics relating to (1) the number of disbarred lawyers who have applied for reinstatement, (2) how many have been successful and (3) the number of lawyers suspended for five years? How do the limited number of states which include "permanent disbarment" as a potential sanction justify it? In addition to our concern about the lack of essential specificity in the proposal, it is equally important to fully explore and examine the justification for the proposed addition to "permanent disbarment" to our rules governing sanctions.

¹ As a point of reference, it should be noted that statistics compiled by the State Bar indicate that from 2006-2012, the orders of disbarment have averaged 12 per year (11.857). The numbers of disbarments for each year are listed in parenthesis following each year: 2006 (14), 2007 (12), 2008 (10), 2009 (15), 2010 (7), 2011 (13) and 2012 (12).